Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF THE TREASURY

31 CFR Part 103

RIN 1506–AA07

Financial Crimes Enforcement Network; Proposed Amendments to the Bank Secrecy Act Regulations Regarding Tribal Gaming

AGENCY: Financial Crimes Enforcement Network, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Financial Crimes Enforcement Network (''FinCEN'') is proposing to amend the regulations implementing the statute generally referred to as the Bank Secrecy Act to include certain gaming establishments operated by or on behalf of Indian tribes within the definition of financial institution subject to those regulations. The amendments would extend the reporting and recordkeeping requirements and anti-money laundering safeguards of the Bank Secrecy Act to such gaming establishments.

DATES: Written comments on all aspects of the proposed regulation are welcome and must be received on or before November 1, 1995.

ADDRESSES: Written comments should be submitted to: Office of Regulatory Policy and Enforcement, Financial Crimes Enforcement Network, Department of the Treasury, 2070 Chain Bridge Road, Vienna, Virginia 22182, *Attention:* NPRM—Tribal Gaming. *Submission of comments.* An original and four copies of any comment must be submitted. All comments will be available for public inspection and copying, and no material in any such comments, including the name of any person submitting comments, will be recognized as confidential. Accordingly, material not intended to be disclosed to the public should not be submitted. *Inspection of comments.* Comments may be inspected at the Department of Treasury between 10:00 a.m. and 4:00 p.m., in the Treasury Library, which is located in room 5030, 1500 Pennsylvania Avenue NW., Washington, D.C. 20220. Persons wishing to inspect the comments submitted should request an appointment at the Treasury Library at (202) 622–0990.

FOR FURTHER INFORMATION CONTACT: Leonard C. Senia, Compliance Specialist, Office of Regulatory Policy and Enforcement, Financial Crimes Enforcement Network, (703) 905–3931, or Joseph M. Myers, Attorney-Advisor, Office of Legal Counsel, Financial Crimes Enforcement Network, (703) 905–3557.

SUPPLEMENTARY INFORMATION:

Introduction

This document proposes (i) to amend the definition of ''casino'' in 31 CFR 103.11(i)(7)(i), (ii) to amend or add other definitions in 31 CFR 103.11, and (iii) to make a conforming change to the specification in 31 CFR 103.36(b)(7) of certain records required to be maintained by casinos. The proposed changes reflect the terms of section 409 of the Money Laundering Suppression Act of 1994 (the ''Money Laundering Suppression Act''), Title IV of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103–325.

Background

The statute popularly known as the ''Bank Secrecy Act,'' Pub. L. 91–508, as amended, codified at 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5330, authorizes the Secretary of the Treasury, *inter alia,* to issue regulations requiring financial institutions to (i) keep records and file reports that are determined to have a high degree of usefulness in criminal, tax, and regulatory matters, (ii) implement counter-money laundering programs and compliance procedures, and (iii) report potentially suspicious transactions to the federal government. Regulations implementing Title II of the Bank Secrecy Act (codified at 31 U.S.C. 5311–5330), appear at 31 CFR Part 103. The authority of the Secretary to administer the Bank Secrecy Act has been delegated to the Director of FinCEN.

The range of financial institutions to which the Bank Secrecy Act applies includes not only banks and other depository institutions, but also securities brokers and dealers, money transmitters, and the other non-bank businesses that offer customers one or more financial services. Gambling casinos were made subject to the Bank Secrecy Act as of May 7, 1985, by regulation issued early that year, *see* 50 FR 5065 (February 6, 1985). Treasury has issued three sets of rules relating to the application of the Bank Secrecy Act to casino gaming establishments. *See* 50 FR 5064–5069 (February 6, 1985); 54 FR 1165–1167 (January 12, 1989); and 59 FR 61660–61662 (December 1, 1994) (modifying and putting into final effect the rule originally published at 58 FR 13538–13550 (March 12, 1993)).

Legalized casino gaming in the United States has grown greatly since 1985. An important component of that growth has been the opening of casinos and other gaming establishments on Indian lands, primarily under the procedures established by the Indian Gaming Regulatory Act (Pub. L. 100–497, codified at 18 U.S.C. 1166–1168, and 25 U.S.C. 2701–2721). State gaming regulators and staff members of the National Indian Gaming Commission (the ''NIGC''), established pursuant to the Indian Gaming Regulatory Act, have indicated that there were approximately 120 tribal casinos, of various sizes and types, operating during 1994 in a total of 16 states. Industry statistics for 1993 (the last year for which statistics are readily available) indicate that wagering at tribal casinos exceeded $27 billion in that year, a steep rate of increase from prior years' results.

Section 409 of the Money Laundering Suppression Act codified the application of the Bank Secrecy Act to gaming activities by adding casinos and other gaming establishments to the list of financial institutions specified in the Bank Secrecy Act itself.[1] The statutory specification reads:

(2) financial institution means—

(X) a casino, gambling casino, or gaming establishment with an annual gaming revenue of more than $1,000,000 which—

(i) is licensed as a casino, gambling casino, or gaming establishment under the laws of

[1] The 1985 action initially making casinos subject to the Bank Secrecy Act had been based on Treasury's statutory authority to designate as financial institutions (i) businesses that engage in activities ''similar to'' the activities of the businesses listed in the Bank Secrecy Act, as well as (ii) other businesses ''whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.'' *See* 31 U.S.C. 5312(a)(2)(Y) and (Z) (as renumbered by the Money Laundering Suppression Act).

any State or any political subdivision of any State; or

(ii) is an Indian gaming operation conducted under or pursuant to the Indian Gaming Regulatory Act other than an operation which is limited to class I gaming (as defined in section 4(6) of such Act)
* * *.

31 U.S.C. 5312(a)(2)(X). As discussed more fully below, this notice is part of the broader process of rethinking the application of the Bank Secrecy Act to casinos that began with the issuance of burden-reducing amendments to the Bank Secrecy Act regulations governing casinos in December 1994.

See 59 FR 61660–61662 (December 1, 1994).

Explanation of Provisions

A. *Overview.* The proposed regulations would amend the definition of ''casino'' to include explicitly casinos operated on Indian lands; make related changes to the regulatory definitions of ''person'' and ''United States'' in 31 CFR 103.11(n) and 103.11(s), respectively; and add definitions of the terms ''Indian Gaming Regulatory Act'', ''State'', and ''Territories and Insular Possessions'', as proposed in 31 CFR 103.11 (v), (w), and (x), respectively. A related amendment is proposed to the record retention requirements found in 31 CFR 103.36(b)(7), to reflect the regulatory system contemplated by the Indian Gaming Regulatory Act.

B. *Definition of Casino.* The definition of casino is proposed to be amended to include explicitly casinos operated on Indian lands. Under the proposed amendment, the term casino would include, *inter alia,* any casino or gambling casino duly licensed or authorized to do business under the Indian Gaming Regulatory Act or other federal, state, or tribal law or arrangement affecting Indian lands. The term would thus include casinos that are doing business on Indian lands on a basis other than that specified in the Indian Gaming Regulatory Act. For example, a casino that operates on Indian lands under a view that compliance with the Indian Gaming Regulatory Act is unnecessary or inconsistent with inherent tribal rights would not for that reason be exempted from the terms of the Bank Secrecy Act, to the extent that those terms would otherwise apply to the casino's operations.[2]

The general need for and appropriateness of treatment of casinos as financial institutions for purposes of the Bank Secrecy Act have been accepted, as indicated above, since the mid-1980s. Treasury made clear in its first formal statements on this subject the need to prevent casinos, which both deal in cash and cash-equivalent chips and can offer a variety of other financial services to customers, from being used to avoid the effect of the Bank Secrecy Act.[3] There is no reason to expect that the potential risk of such activity in casinos on Indian lands, if those casinos were not subject to the Bank Secrecy Act, is any less (or any greater) than for state-licensed casinos. Prior to the enactment of the Money Laundering Suppression Act, the issue whether the Bank Secrecy Act could be applied to gaming operations on Indian lands was unsettled in light of the language of section 20(d) of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(d), and the disinclination to apply general federal legislation to the affairs of Indian tribes without clear Congressional authorization. Section 409 of the Money Laundering Suppression Act grants direct authority to the Secretary of the Treasury to apply the Bank Secrecy Act to most tribal gaming operations and is backed by a strong expression of Congressional intent, in the legislative documents accompanying the statute, ''* * * to eliminate confusion about which currency reporting system applies to Indian casinos.'' *See* H.R. Rep. No. 652, 103d Cong., 2d Sess. 193 (1994). (The other currency reporting system is that created, for trades or businesses not subject to the Bank Secrecy Act, by section 6050I of the Internal Revenue Code of 1986.)

The retention in the proposed regulation of the term ''casino'', rather than substitution in 31 CFR 103.11(i)(7)(i) of the broader authorizing language of 31 U.S.C. 5312(a)(2)(X), is intentional. The Department of the Treasury has generally sought to apply the Bank Secrecy Act to gaming establishments that provide their customers with a financial product—gaming—and as a corollary offer a broad array of financial services, such as customer deposit or credit accounts, facilities for transmitting and receiving funds transfers directly from other institutions, and check cashing and currency exchange services, that are similar to those offered by depository institutions and other financial firms.

By way of contrast, the Indian Gaming Regulatory Act defines classes of gaming establishments with reference to specific games that may be offered by those establishments. States or the NIGC may authorize and regulate under that Act tribal gaming activities, such as bingo, lotteries, and pari-mutuel betting, that are not generally offered in casino settings. These types of gaming may create different problems for law enforcement, tax compliance, and counter-money laundering programs than do full-scale casino operations. Although the Money Laundering Suppression Act grants the Department of the Treasury authority to extend the Bank Secrecy Act to the full range of gaming establishments in the United States, FinCEN wishes to concentrate at this time on resolving the issues raised by extending the existing Bank Secrecy Act structure to true casino-like establishments operating on Indian lands.

The other changes in the definition of casino are designed simply to list explicitly the three classes of government authorities that can authorize or license casinos subject to the Bank Secrecy Act. The changes are intended neither to expand nor contract the coverage of the Bank Secrecy Act to casinos operating under State authority or under the authority of various United States territories or possessions.

C. *Treatment of Casinos Under the Bank Secrecy Act.* Thus, under the proposed regulations, casinos operating on Indian lands would become subject not simply to the Bank Secrecy Act's currency transaction reporting rules but to the full set of provisions (described by the Congress as ''a comprehensive currency reporting and detailed recordkeeping system with numerous

[2] The authority for the application of the Bank Secrecy Act to casinos that are neither licensed by state or local authorities nor operated on Indian Lands pursuant to the Indian Gaming Regulatory Act is found in 31 U.S.C. 5312(a)(2)(Y) and (Z), cited above, which as noted were the basis for application of the Bank Secrecy Act to casinos prior to the enactment of the Money Laundering Suppression Act.

[3] The preamble to the final rule bringing casinos within the Bank Secrecy Act stated that

> [i]n recent years Treasury has found that an increasing number of persons are using gambling casinos for money laundering and tax evasion purposes. In a number of instances, narcotics traffickers have used gambling casinos as substitutes for other financial institutions in order to avoid the reporting and recordkeeping requirements of the Bank Secrecy Act.
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> Inclusion of casinos in the definition of financial institution[s] in 31 CFR Part 103 was among the specific recommendations in the October 1984 report of the President's Commission on Organized Crime, 'The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering'. The problem was also the subject of hearings in 1984 before the House Judiciary Subcommittee on Crime entitled 'The Use of Casinos to Launder the Proceeds of Drug Trafficking and Organized Crime'.
>
> In order to prevent the use of casinos in this fashion, Treasury is amending the regulations in 31 CFR Part 103 to require gambling casinos to file the same types of reports [and maintain the same types of records] that it requires from financial institutions currently covered by the Bank Secrecy Act.

50 FR 5065, 5066, (February 6, 1985); *see also* 49 FR 32861, 32862 (August 17, 1984) (corresponding language in notice of proposed rulemaking).

anti-money laundering safeguards'') to which other casinos in the United States are subject. *See* H.R. Rep. No. 652, *supra*.

The Bank Secrecy Act generally imposes several sets of requirements on casinos. First, each casino is required to file with the Department of the Treasury a report of each receipt or disbursement of more than $10,000 in currency in its gaming operations; aggregation of multiple transactions is required in a number of situations. *See* 31 CFR 103.22(a)(2). In addition, later this year, Treasury will issue regulations to require financial institutions, including casinos, to file reports of suspicious transactions. *See* 31 U.S.C. 5318(g)(1).

Each casino is also required by the Bank Secrecy Act to maintain certain records relating to the casino's operation, including records identifying account holders (*see* 31 CFR 103.36(a)), or showing transactions for or through each customer's account (*see, generally,* 31 CFR 103.36(b)), and transactions involving persons, accounts or places outside the United States, (*see* 31 CFR 103.36(b)(5)); records which are prepared or used by a casino to monitor a customer's gaming activity or records of purchases of more than $3,000 worth of checks or other monetary instruments are also among the types of records that must be maintained (*see* 31 CFR 103.36(b)(8) and (b)(9)). Finally, casinos must institute training and internal control programs to assure and monitor compliance with the Bank Secrecy Act (*see* 31 CFR 103.36(b)(10) and 103.54(a)).

Gaming establishments within the scope of the proposed rule will remain subject to the filing requirements of section 6050I of the Internal Revenue Code, with respect to their gaming and financial services operations, until this proposed rule becomes effective. *See* section 6050I of the Internal Revenue Code, 26 U.S.C. 6050I(a) and (c); Treas. Reg. 1.6050I–1(d)(2). Gaming establishments, whether non-tribal or tribal, that are not included within the definition of casino in the Bank Secrecy Act remain fully subject to the currency reporting rules of section 6050I of the Internal Revenue Code; section 6050I of the Code will also continue to apply to non-gaming and non-financial services operations, for example hotel accommodations, at casinos that are subject to the Bank Secrecy Act.

D. *Request for Comments on Specific Subjects.* FinCEN recognizes that the circumstances of tribal gaming are not uniform throughout the United States, and it is keenly aware of the need to proceed thoughtfully in adopting the rules of the Bank Secrecy Act to the realities of the operation of casinos on Indian lands. FinCEN specifically seeks comment on the following questions:

1. Are there particular parts of the Bank Secrecy Act regulations applicable to casinos generally that do not accurately reflect the way tribal casinos operate?

2. What types of financial services, other than gaming, are offered by tribal casinos or by other financial businesses operating at such casinos?

3. How can compliance with the Bank Secrecy Act by tribal casinos best be examined and enforced?

4. How should compliance by tribal casinos with the Bank Secrecy Act be integrated with the regulatory regimes created by the Indian Gaming Regulatory Act and the tribal-state compacts required by that statute for authorization of Class III gaming?

In seeking guidance on these and other issues raised by this notice of proposed rulemaking, FinCEN is interested in hearing from all parties potentially affected by the proposed rules, including Indian tribes on whose lands gaming is conducted, tribal or non-tribal enterprises that manage casinos on such lands, and officials of state and local governments within whose boundaries such lands are located. FinCEN will consider holding a public hearing on the proposed rule if comments suggest that a public hearing would be productive.

Equalization of the treatment of state-licensed and tribal casinos is necessary as a prelude to the consideration of broader issues affecting the application of the Bank Secrecy Act to the gaming industry. Those issues include whether clarifications should be made in the definition of casino as new types of gaming develop (or whether the term ''casino'' is sufficiently elastic to encompass such developments,[4]) whether special rules should be applicable to small casinos, and how best to implement the provisions added to the Bank Secrecy Act generally with respect to gaming establishments by the Annunzio-Wylie Anti-Money Laundering Act of 1992, Title XV of the Housing and Community Development Act of 1992, Pub. L. 102–550, and the Money Laundering Suppression Act.

E. *Other Changes in ''Meaning of Terms''.* Changes are also proposed to be made to the definitions of ''person'' and ''United States'' in 31 CFR 103.11(n) and (s), and definitions of the terms ''Indian Gaming Regulatory Act'', ''State'', and ''Territories and Insular Possessions'' are proposed to be added to § 103.11 as new paragraphs (v), (w), and (x), respectively. As explained immediately above, these definitions are proposed to permit efficient application of 31 CFR Part 103 to tribal casinos. The proposed definitions of terms ''State'' and ''Territories and Insular Possessions'' will be repeated in the rules published to implement the provisions of section 402 of the Money Laundering Suppression Act relating to the mandatory exemption of certain transactions with depository institutions from the currency transaction reporting requirements of 31 U.S.C. 5313 and 31 CFR 103.22.[5]

F. *Additions to Record Maintenance Requirements.* The requirement of 31 CFR 103.36(b)(7) that casinos retain all records, documents or manuals required to be maintained under state and local laws or regulations is proposed to be amended to recognize that tribal casinos are required to retain records in many cases either by tribal governing authorities or under the terms of tribal-state compacts authorizing Class III gaming on Indian lands under the Indian Gaming Regulatory Act. The proposed change simply conforms the record retention requirements to reflect the fact that a casino on tribal lands will retain certain documents because tribal rules or tribal-state compacts, rather than state regulation, require their retention.

Proposed Effective Date

The amendments to 31 CFR Part 103 proposed in this notice of proposed rulemaking will become effective 90 days following publication in the **Federal Register** of the final rule to which this notice relates.

[4] For example, an establishment that claimed to be a gambling ''club'' rather than a casino because it simply offered customers an opportunity to gamble with one another, but that in practice funded certain customers so that other customers were in effect gambling against ''house'' money, and that offered its customers financial services of various kinds, is arguably a casino under present law. Thus, for example, if such a ''club'' failed to file currency transactions reports or allowed a customer to deposit funds in a player bank account in the name of the customer without requiring the customer to provide identifying information, the club would arguably be operating in violation of the Bank Secrecy Act.

[5] The numbering scheme used in this notice of proposed rulemaking reflects the July 1, 1994 edition of the Code of Federal Regulations; the definitions contained in 31 CFR 103.11 will automatically be renumbered as of January 1, 1996, when the rules relating to funds transfers and transmittals of funds by financial institutions take effect. FinCEN intends to issue in the near future a notice of proposed rulemaking reordering all of the provisions of 31 CFR 103.11 as well as proposing changes in certain of those provisions; the terms dealt with in this notice will appear in that notice of proposed rulemaking without further changes relating to tribal casinos.

Special Analyses

It has been determined that this notice of proposed rulemaking (i) is not subject to the ''budgetary impact statement'' requirement of section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) and (ii) is not a significant regulatory action as defined in Executive Order 12866. It is not anticipated that this proposed rule, if adopted as a final rule, will have an annual effect on the economy of $100 million or more. Nor will it, if so adopted, affect adversely in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities. The proposed rule is neither inconsistent with, nor does it interfere with, actions taken or planned by other agencies. Finally, it raises no novel legal or policy issues.

Because this rule affects Indian gaming establishments with gross annual gaming revenues in excess of $1 million, it is hereby certified that this proposed rule is not likely to have a significant economic impact on a substantial number of small entities.

Drafting Information

Several individuals in FinCEN's Office of Legal Counsel and its Office of Regulatory Policy and Enforcement participated in the development of these regulations.

List of Subjects in 31 CFR Part 103

Authority delegations (Government agencies), Banks and banking, Currency, Foreign banking, Investigations, Law enforcement, Reporting and recordkeeping requirements, Taxes.

Proposed Amendments to the Regulations

Accordingly, 31 CFR Part 103 is proposed to be amended as follows:

PART 103—FINANCIAL RECORDKEEPING AND REPORTING OF CURRENCY AND FOREIGN TRANSACTIONS

1. The authority citation for Part 103 continues to read as follows:

Authority: Pub. L. No. 91–508, Title I, 84 Stat. 1114 (12 U.S.C. 1829b, 1951–1959); and the Currency and Foreign Transactions Reporting Act, Pub. L. No. 91–508, Title II, 84 Stat. 1118, as amended (31 U.S.C. 5311–5330).

2. Section 103.11 is amended by revising paragraphs (i)(7)(i), (n), and (s), and adding paragraphs (v), (w), and (x) to read as follows:

§ 103.11 Meaning of terms.

* * * * *

(i) * * *

(7) (i) *Casino.* A casino or gambling casino that (A) is duly licensed or authorized to do business as such in the United States, whether under the laws of a State or of a Territory or Insular Possession of the United States, or under the Indian Gaming Regulatory Act or other federal, state, or tribal law or arrangement affecting Indian lands (including, without limitation, a casino operating on the assumption or under the view that no such authorization is required for casino operation on Indian lands) and that (B) has gross annual gaming revenue in excess of $1 million. The term includes the principal headquarters and every domestic branch or place of business of the casino.

* * * * *

(n) *Person.* An individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, an Indian Tribe (as that term is defined in the Indian Gaming Regulatory Act), and all entities cognizable as legal personalities.

* * * * *

(s) *United States.* The States of the United States, the District of Columbia, the Indian lands (as that term is defined in the Indian Gaming Regulatory Act), and the Territories and Insular Possessions of the United States.

* * * * *

(v) *Indian Gaming Regulatory Act.* The Indian Gaming Regulatory Act of 1988, codified at 25 U.S.C. 2701 *et seq.*

(w) *State.* The States of the United States and, wherever necessary to carry out the provisions of this Part, the District of Columbia.

(x) *Territories and Insular Possessions.* The Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, and all other territories and possessions of the United States other than the Indian lands and the District of Columbia.

§ 103.36 [Amended]

3. Section 103.36(b)(7) is amended by adding after the words ''state and local laws or regulations'' the words '', regulations of any governing Indian tribe or tribal government, or terms of (or any regulations issued under) any Tribal-State compacts entered into pursuant to the Indian Gaming Regulatory Act, with respect to the casino in question''.

Dated: July 26, 1995.

Stanley E. Morris,

Director, Financial Crimes Enforcement Network.

[FR Doc. 95–19137 Filed 7–31–95; 3:30 pm]

BILLING CODE 4820–03–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Ch. I

[FRL–5267–9]

Open Market Trading Rule for Ozone Smog Precursors

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed policy statement and model rule; Notice of public hearing.

SUMMARY: This notice conveys EPA's strong support for an innovative approach in emissions trading that would bring better, faster, and less expensive progress towards our nation's air quality goals. This innovative approach, known as open market trading, would allow all types of sources to trade emissions of pollutants that cause ground-level ozone and significantly reduce the overall cost of meeting the public health and environmental goals of the national ambient air quality standards (NAAQS) for ozone. An important feature of this approach is that individual trades would not have to be processed as separate State implementation plan (SIP) revisions. Rather, open market trades would provide sources with an alternative means of compliance, and they would be reviewed by State and Federal authorities predominantly during compliance determinations. The EPA believes this open market approach can provide important emissions reduction benefits. It can be put into operation immediately in places where area-wide emissions budgets and source allocations needed to meet the ozone standard have yet to be determined. The unique character of this approach encourages and permits market participation and innovation by smaller stationary sources and mobile sources. It also encourages sources to make reductions early; these reductions can provide immediate public health benefits. By providing a lower cost compliance alternative, the open market approach can make it easier for States to adopt additional control measures where needed to achieve attainment.

The EPA has developed today's proposed open market trading rule (OMTR) as a new approach that would supplement, and would not modify or